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Cifuentes-Villatoro v. Ashcroft, No. 02-70444
Ferguson, Circuit Judge, dissenting.

CATHY A. CATTERSON
U.S. COURT OF APPEALS

I respectfully dissent. The majority holds that Alvaro Rodrigo “Cifuentes-Villatoro has not adduced ‘credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution.’” Maj. Op. at 3 (quoting *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999)). I disagree. The evidence that Cifuentes-Villatoro proffered is sufficient to find that his fear of persecution if returned to Guatemala is objectively reasonable. *See id.*

First, it is important to note that the Immigration Judge (“IJ”) found Cifuentes-Villatoro credible and accepted his testimony, notwithstanding any inconsistencies that there may have been. In other words, the IJ believed Cifuentes-Villatoro was telling the truth about his harassment by the guerrillas. “Because the immigration judge is in the best position to evaluate an alien’s testimony, his or her credibility determinations are to be given ‘much weight.’” *Estrada v. INS*, 775 F.2d 1018, 1021 (9th Cir. 1985) (quoting *Phinpathya v. INS*, 673 F.2d 1013, 1019 (9th Cir. 1981), *rev’d on other grounds*, 464 U.S. 183 (1984)).

Cifuentes-Villatoro’s asylum application references three letters that he received from the guerrillas ordering him to desert the military and join them. It also describes the incident that ultimately prompted Cifuentes-Villatoro to flee

Guatemala, the ambushing of his vehicle during which his wife was shot and killed. At the hearing, Cifuentes-Villatoro reiterated his fear of persecution by the guerrillas based on the letters he received and the ambush incident. Taking this testimony as true as the IJ did, Cifuentes-Villatoro possessed a reasonable fear of persecution. *See Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (holding that “[t]he BTF wanted to recruit Sangha and threatened him with death. These BTF actions are sufficient to show persecution under the Act.”); *see also Arteaga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988) (“Forced recruitment by a revolutionary army is tantamount to kidnapping, and is therefore persecution.”).

No amount of changed political circumstances or lapse of time can diminish the fact that Cifuentes-Villatoro was singled out by the guerrillas and that his wife was killed as a result. While it is true that Cifuentes-Villatoro failed to provide any evidence that his family in Guatemala is being harassed by the guerrillas presently, *see Estrada v. INS*, 775 F.2d at 1021-22, this can be partially explained by the fact that Cifuentes-Villatoro’s wife, and thus his closest family member, was killed during the ambush.

In addition, Cifuentes-Villatoro’s claim for asylum and withholding of removal is based on his own individual membership in the military and his blatant refusal to desert at the request of the guerrillas. His mother and children, who

were quite young when Cifuentes-Villatoro fled Guatemala, had no other ties to the military. The fact that his brother continues to serve in the military and has not been targeted by the guerrillas is inapposite given that the record lacks any information as to his brother's political opinion (or the political opinion of his other family members) and whether he was similarly ordered to desert his post. Moreover, that the record is lacking any evidence that Cifuentes-Villatoro's family members are presently being targeted by the guerrillas is minimally probative because the asylum application is based on an individual's political opinion and disassociation from the guerrillas.

Furthermore, contrary to the majority's assertion, the totality of the circumstances demonstrate that Cifuentes-Villatoro's persecution by the guerrillas stemmed from his holding a contrary political opinion.

Cifuentes-Villatoro's asylum application notes that his refusal to desert the military and join the guerrillas was twofold: "Because of the differences of political opinion and views based up on [sic] the fact that I don't agree with their ideal of freedom and democracy, specially [sic] now after they killed my wife and injured me, and two: Because those who desert from the military or join the guerrilla are put in jail or killed by the military [sic]." Thus, Cifuentes-Villatoro possessed a political opinion contrary to that held by the guerrillas.

Although the record in this case is sparse,¹ Cifuentes-Villatoro demonstrated that his persecutors were aware of his political opinion, and targeted him as a result. His refusal to leave the military and join the guerrillas upon receiving the first letter publicly evinced his political opinion, an opinion which the guerrillas were made aware of by his sheer inaction. Moreover, there was “no other logical reason for the persecution[,]” *Sangha v. INS*, 103 F.3d at 1490, particularly considering that the guerrillas took the extreme act of assassinating his wife after his initial refusal. The fact that the guerrillas continued to send Cifuentes-Villatoro letters instructing him to leave the military, even after they killed his wife, is further circumstantial² evidence that they targeted him because of his political opinion, and not simply because he refused to increase their ranks. *See id.* at 1489 (“it seems unlikely that the BTF would deliberately seek out those who opposed it in order to fill its ranks.”). The only logical reason for the harm they caused Cifuentes-Villatoro was his political opinion.

In sum, Cifuentes-Villatoro has clearly demonstrated well-founded facts which entitle him to asylum relief.

¹ Cifuentes-Villatoro was not represented by an attorney during his hearing.

² Direct or circumstantial evidence of motive is acceptable. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).